

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PharmacyChecker.com LLC,

Plaintiff,

vs.

National Association of Boards of
Pharmacy et al.,

Defendants.

Civil Action No. 7:19-cv-07577-KMK

**Declaration of Gabriel Levitt in
Support of Plaintiff's Opposition to
Defendants' Joint Motion for
Summary Judgment on Sherman
Act § 1 Claim**

Judge Kenneth M. Karas
Magistrate Judge Paul E. Davison

I, Gabriel Levitt, declare and state as follows:

1. I am President and Co-founder of plaintiff PharmacyChecker.com LLC in this matter. As President I have access to plaintiff's documents and business records. Moreover, I have personal knowledge of documents retrieved by plaintiff's personnel for or in relation to the captioned case that have been produced in discovery.

2. This declaration is made in support of Plaintiff's Opposition to Defendants' Joint Motion for Summary Judgment on Sherman Act § 1 Claim.

3. Between January 1, 2016 to present, plaintiff has accredited pharmacies under its Verification Program from the United States, Canada, Barbados, Australia, New Zealand, United Kingdom, Turkey, India, Mauritius, and Israel.

4. PX 2 is a report produced in the litigation as PCC_0000025–PCC_0000031. I have no reason to doubt that PX 2 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation,

from PharmacyChecker.com files by PharmacyChecker.com personnel. The report shows that PhamacyChecker.com, between January 1, 2015 and August 1, 2021 had:



5. PX 3 is a replication, in PDF format, of a portion of the FDA's website at www.fda.gov/about-fda/fda-basics/it-legal-me-personally-import-drugs, which was publicly accessed by plaintiff's representative on July 8, 2022. The webpage is titled "Is it legal for me to personally import drugs?"

6. PX 5 is a replication, in PDF format, of a portion of the FDA's website at www.fda.gov/industry/import-basics/personal-importation, which was publicly

accessed by plaintiff's representative on July 15, 2022. The webpage is titled "Personal Importation."

7. PX 8 is a replication, in PDF format, of Section 9-2 of the FDA's Regulatory Procedures Manual that was retrieved from the FDA's website at www.fda.gov/media/71776/download, which was publicly accessed by plaintiff's representative on July 15, 2022.

8. [REDACTED] was a U.S. pharmacy, which was accredited under plaintiff's verification program from April 2015 to January 25, 2017.

9. PX 22 is an email produced in the litigation as PCC_0302269–PCC_0302270. I received this email on January 25, 2017 from [REDACTED]

[REDACTED]. In the email, [REDACTED] informed me that [REDACTED] was terminating its relationship with plaintiff because of threats that such would be "considered a violation of VIPPS and being an affiliate of yours could cost us our accreditation."

10. From January 1, 2015 to present, the total number of U.S.-based pharmacies participating in plaintiff's verification program [REDACTED]
[REDACTED]

11. PX 12 is a replication, in PDF format, of a portion of PharmacyChecker.com's website at www.pharmacychecker.com/prescription-discount-card, which was publicly accessed by plaintiff's representative on July 15, 2022. The webpage is titled "Get Your Free U.S. Prescription Discount Card."

12. PX 13 is a replication, in PDF format, of a portion of PharmacyChecker.com's website that contains a press release dated May 22, 2019 at www.pharmacychecker.com/prescription-discount-card, which was publicly accessed by plaintiff's representative on July 15, 2022. The press release is titled, "Generic Drugs 68% Cheaper in U.S. Than From Canada: U.S. Patients Advised to Look Locally for Generics, Internationally for Brand Name Medications."

13. PX 16 is a replication, in PDF format, of a portion of the Wall Street Journal's website that contains a news article dated July 11, 2022, www.wsj.com/articles/in-defense-of-pharmacy-benefit-managers, which was publicly accessed by plaintiff's representative on July 11, 2022. The article is titled "In Defense of Pharmacy Benefit Managers: Drug-company lobbyists are pushing policy makers to kill the golden goose."

14. PX 39 is a replication, in PDF format, of a portion of NBC News' website that contains a news article dated January 19, 2004, www.nbcnews.com/health/health-news/import-drugs-may-cost-more-generics-finalc9445671, which was publicly accessed by plaintiff's representative on July 16, 2022. The news article is titled "Import drugs may cost more than generics."

15. In 2017, the World Health Organization published a document called "WHO Global Surveillance and Monitoring Systems for Substandard and Falsified Medical Products," wherein an article in PharmacyCheckerBlog.com, titled "How many people buying from international online pharmacies have a prescription?" was cited as authority. The WHO publication can be found at

apps.who.int/iris/bitstream/handle/10665/326708/9789241513426-eng.pdf?sequence=1&isAllowed=y and the reference to PhamarcyChecker.com can be found on page 61 at end note number 10.

16. PX 19 is plaintiff's Listing Program Agreement (rev. 2019) produced in this litigation as PCC_0000011. I have no reason to doubt that PX 19 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

17. PX 15 is a replication, in PDF format, of a portion of PharmacyChecker.com website at www.pharmacychecker.com/drug-price-comparisons. The webpage is titled "Drug Prices in the United States, Canada, and Other Countries." The webpage provides PharmacyChecker.com visitors with drug prices from the U.S., Canada, and from other countries, to inform and educate consumers of the lowest prescription drug prices, no matter where they are.

18. Plaintiff's accredited pharmacies that choose to participate in the Listing Program [REDACTED]

[REDACTED]

19. PX 27 is plaintiff's Verification Program Accreditation Standards and Guide (rev. Jan. 3, 2020) produced in this litigation as PCC_0000084–PCC_0000107. I have no reason to doubt that PX 27 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

20. PX 35 is plaintiff's Verification Program Policies (rev. June 15, 2018) produced in this litigation as PCC_0146111–PCC_0146149. I have no reason to doubt that PX 35 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

21. On information and belief, the verification programs run by defendants NABP and LegitScript are similar to plaintiff's pharmacy verification program, insofar as they require that pharmacies in their programs meet and maintain all standards of practice in order to be accredited. Since all plaintiff's accredited pharmacies must equally meet all Verification Program and, if participating, Listing Program standards, plaintiff does not rank or otherwise distinguish the safety or reliability of its accredited pharmacies.

22. PharmacyChecker.com visitors that land on the webpage titled "Drug Prices in the United States, Canada, and Other Countries" (*see supra*, ¶ 17) can sort drug search results by price per pill/unit or by total price. These sorting options negate rankings tied to plaintiff's cost-per-click rates by accredited pharmacies that are part of the Listing Program.

23. PX 20 is an email produced in this litigation as PCC_0277520–PCC_0277532. The email contains [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] . I have no reason to doubt that PX 20 is an authentic PharmacyChecker.com document that was retrieved for purposes of this

24.

25.

The image shows a horizontal bar chart consisting of six bars. The first five bars are solid black and increase in width from left to right. The sixth bar is also black but features a thick yellow border around its perimeter.

26. Between January 1, 2015 to present, accredited pharmacies based in the United States dropped [REDACTED]

27. PX 1 is a report produced in this litigation as PCC_0126266. I have no reason to doubt that PX 1 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by

PharmacyChecker.com personnel. The report identifies all accredited pharmacies active between January 2015 to August 2021. The report includes two tabs, the first tab lists all current accredited pharmacies; and the second tab lists all previously accredited pharmacies. Column M lists the country in which each pharmacy is located. Based on this report, plaintiff had 193 total accredited pharmacies, and of these:

Moreover, based on paragraph 27 (*see supra*) and PX 1,

29. PX 23 is a draft/redline copy of defendants' amended expert report of Peter Kent, which was delivered to plaintiff in this litigation. The draft shows revisions made by Mr. Kent to his expert report between March 2022 to June 15, 2022.

30. PX 33 is plaintiff's Online Pharmacy (website): Shared Services Agreement, between [REDACTED] — produced in this litigation as PCC_0159993–PCC_0159999. I have no reason to doubt that PX 35 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

31. PX 34 is plaintiff's Online Pharmacy (website): Shared Services Agreement, between [REDACTED] produced in this litigation as PCC_0214686–PCC_0214688. I have no reason to doubt that PX 35 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

32. PharmacyChecker.com does not list PricePro Pharmacy as a U.S. based dispensing pharmacy; it identifies PricePro as an international online pharmacy. PricePro works with several dispensing pharmacies, ones accredited by plaintiff, including a pharmacy licensed in the U.S. As part of plaintiff's Verification Program, accredited online pharmacies often work with several dispensing pharmacies, so long as both are accredited by plaintiff. Each year affiliated accredited online and dispensing pharmacies are required to disclose their relationship and submit a Shared Services Agreement (*See* PX 33; *cf.* PX 34); and every six months, plaintiff confirms that the dispensing pharmacy is properly licensed in the jurisdiction in which it operates.

33. Plaintiff uses HTML meta tags, which reflect the content of PharmacyChecker.com webpages for the purpose of optimizing website user experience.

34. Plaintiff lists drug prices in U.S. dollars because it reflects the prices on the online pharmacies in its program. Further, the U.S. dollar is the most prevalent global currency and one that is recognized to best meet plaintiff's global audience. The importance of maintaining current and up-to-date prescription drug pricing information is necessary to ensure PharmacyChecker.com visitors are able to make reliable and informed choices.

35. PX 24 is a replication, in PDF format, of a portion of PharmacyChecker.com at pharmacychecker.com/support, which was publicly accessed by plaintiff's representative on July 15, 2022. The webpage is titled PharmacyChecker Consumer Support.

36. PX 25 is a replication, in PDF format, of a portion of PharmacyChecker.com at pharmacychecker.com/aboutus, which was publicly accessed by plaintiff's representative on July 15, 2022. The webpage is titled About PharmacyChecker.

37. PX 28 is plaintiff's Verification Program Compliance Audit Form: Applicant (rev. June 26, 2020) produced in this litigation as PCC_0244097–PCC_0224140. I have no reason to doubt that PX 28 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

38. PX 29 is a spreadsheet, maintained by plaintiff, which contains notes concerning PharmacyChecker.com visitor complaints against plaintiff's accredited pharmacies between January 2016 to December 2020, that was produced as PCC_0161984 I have no reason to doubt that PX 29 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

39. PX 31 is a replication, in PDF format, of a portion of the website of the Manitoba Court containing a court decision made in the case *Thorkelson v. The College of Pharmacists of Manitoba et al.*, No. 19-01-25166, https://www.manitobacourts.mb.ca/site/assets/files/1042/thorkelson_v_the_college_of_pharmacists_of_manitoba_et_al_2022_mbqb_29.pdf, which was publicly accessed by plaintiff's representative on July 17, 2022.

40. PX 32 is an article on PharmacyCheckerBlog.com, published on April 25, 2018, produced in the litigation as PCC_0155005. I have no reason to doubt that PX 32 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

41. PX 35 is Verification Program Policies (rev. June 15, 2018) produced in the litigation as PCC_0146111–PCC_0146149. I have no reason to doubt that PX 35 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

42. PX 36 is a replication, in PDF format, of a portion of the Department of Justice's website, www.justice.gov/opa/pr/google-forfeits-500-million-generated-online-ads-prescription-drug-sales-canadian-online, which was publicly accessed by plaintiff's representative on July 17, 2022. The press release is titled: "Google Forfeits \$500 Million Generated by Online Ads & Prescription Drug Sales by Canadian Online Pharmacies: Internet Search Engine Accepted Advertisements from Online Canadian Pharmacies that Targeted U.S. Consumers and Illegally Imported Controlled and Non-Controlled Prescription Drugs into the United States."

From review of Table 9 on page 23 of defendants' expert report by J. Mark Farrar (*see supra*, ¶ 24).

■ From review of Table 9 on page 23 of defendants' expert report by J. Mark Farrar (*see supra*, ¶ 24), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] From review of table 1 on page 6 of defendants' expert report by J. Mark Farrar and pages 7–8 of defendants' amended expert report of Peter Kent,

[REDACTED]

46. PX 38 is a replication, in PDF format, of a report of the Congressional Research Service dated February 11, 2021 at <https://crsreports.congress.gov/product/pdf/IF/IF11056>, which was publicly accessed by plaintiff's representative on July 17, 2022. The report is titled "Prescription Drug Importation."

47. Plaintiff is not a pharmacy and does not sell, dispense, or distribute, or process orders for prescription drugs.

48. Plaintiff's verifications and price comparisons have been recommended or referenced by the New York Times, the Wall Street Journal, AARP Magazine, People's Pharmacy, and many others that are featured on the website. *See* <https://pharmacychecker.com/in-the-news/>.

49. In 2017, plaintiff had at least █ U.S.-based accredited pharmacies in its Verification Program, two of which worked with online pharmacies in the Listing Program.

50. AskPC is a blog that plaintiff uses to provide information concerning commonly asked questions made by PharmacyChecker.com visitors and topics of consumer and public policy interest related to online pharmacies, drug prices, importation and/or safety. It is a tool that educates and informs people anywhere in the world about the disparities of prescription drug prices from country to country. Indeed, through AskPC, any visitor can ask questions that are answered by a panel of experts and published on the website. Some questions are answered in emails to website visitors. Others are answered on AskPC. Plaintiff has received 1604 questions. Separately, there are more than 500 blog posts at PharmacyCheckerBlog.com, which are not responses to consumer inquiries, but articles on public policy, online pharmacy issues, drug importation, and prescription drug safety and savings.

51. Plaintiff is not aware of any criminal indictment against any of its current accredited online pharmacies that have met and maintained the terms and standards set forth in plaintiff's Verification Program and Listing Program.

52. PX 4 is the expert report of Mr. Benjamin England that was produced in this litigation. I have no reason to doubt that PX 4 is an authentic copy of Mr. England's report.

53. PX 6 are excerpts pulled directly from the deposition transcript of Mr. Benjamin England. I have no reason to doubt that PX 6 contains authentic copies of parts of Mr. England's deposition testimony.

54. PX 7 are excerpts pulled directly from my deposition transcript. I have no reason to doubt that PX 7 contains authentic copies of parts of my deposition testimony.

55. PX 9 are excerpts pulled directly from the deposition transcript of Mr. Tod Cooperman. I have no reason to doubt that PX 9 contains authentic copies of parts of Mr. Cooperman's deposition testimony.

56. PX 10 are excerpts pulled directly from the deposition transcript of Mr. J. Mark Farrar. I have no reason to doubt that PX 10 contains authentic copies of parts of Mr. Farrar's deposition testimony.

57. PX 14 is Exhibit 4 to the deposition of Mr. Tod Cooperman. I have no reason to doubt that PX 14 is an authentic copy of the exhibit, which was introduced during Mr. Cooperman's deposition testimony.

58. PX 17 are excerpts pulled directly from the deposition transcript of Mr. Nathan Walker. I have no reason to doubt that PX 17 contains authentic copies of parts of Mr. Walker's deposition testimony.

59. PX 18 are excerpts pulled directly from the deposition transcript of Mr. Peter Kent. I have no reason to doubt that PX 18 contains authentic copies of parts of Mr. Kent's deposition testimony.

60. PX 21 is plaintiff's invoice to Healthwarehouse.com, dated April 22, 2015, and produced in this litigation as PCC_0126530. I have no reason to doubt that PX 21 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

61. PX 30 are excerpts pulled directly from the deposition transcript of Ms. Kelly Ann Barnes. I have no reason to doubt that PX 30 contains authentic copies of parts of Ms. Barnes' deposition testimony.

62. PX 37 is, on information and belief, a true and correct copy of the Non-Prosecution Agreement that was entered into between Google and the U.S. Department of Judgement related to an investigation into Google's acceptance of advertisements placed by online pharmacy advertisers that did not comply with U.S. law and sold controlled substances without a prescription.

63. PX 40 is an AskPC blog post that was published on September 22, 2017 and titled, "My insurance is penalizing me for using Zetia. Do I have to go through my insurance?", which was produced as PCC_0161831–PCC_0161832. I have no

reason to doubt that PX 40 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

64. PX 41 is an email between plaintiff's employees Donna Miller and Kelly Ann Barnes, which was produced in the litigation as PCC_0320846–PCC_0320848. I have no reason to doubt that PX 41 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

65. PX 42 are defendants' Phase One Requests for Production of Documents to Plaintiff PharmacyChecker.com LLC, which was served to plaintiff on June 18, 2021. I have no reason to doubt that PX 42 is an authentic PharmacyChecker.com document that was received, for purposes of this litigation, from defendants.

66. PX 43 is plaintiff's CPC click report to [REDACTED] which was produced in the litigation as PCC_0138806–PCC_0138808. I have no reason to doubt that PX 40 is an authentic PharmacyChecker.com document that was retrieved, for purposes of this litigation, from PharmacyChecker.com files by PharmacyChecker.com personnel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of July 2022 at Brooklyn, New York.



GABRIEL LEVITT

CERTIFICATE OF SERVICE

I, Lisa Mittwol, hereby certify that on this 20th day of July 2022, I caused a copy of Declaration of Declaration of Gabriel Levitt in Support of Plaintiff's Opposition to Defendants' Joint Motion for Summary Judgment on Sherman Act § 1 be served upon counsel of record via the Court's electronic filing system.



LISA MITTWOL